Supreme Court, U.S.
FILED

05 142 JUL 28 2005

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

HAL EDWARD HODGES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DOUGLAS A. TRANT
Counsel of Record

900 S. GAY STREET
SUITE 1502 RIVERVIEW TOWER
KNOXVILLE, TN 37902
(865) 525-9780

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

Whether *Apprendi v. New Jersey*, 530 US 466 (2000), *Blakely v. Washington*, 542 US ___, 124 S. Ct. 2531 (2004), and *United States v. Booker*, 543 US ___, 125 S. Ct. 738 (2005) should be applied retroactively in a Petition for a Second or Subsequent Motion to Vacate Judgment Pursuant to 28 U.S.C. § 2255 (attached as Appendix C). (Addendum to Motion to Vacate Judgment Pursuant to 28 U.S.C. § 2255 also attached as Appendix D)

RULE 14.1(b) STATEMENT

The Petitioner/Appellant: Hal Edward Hodges.

Respondent/Appellee: United States of America

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 14.1(b) STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 1

REASON FOR GRANTING PETITION 2

CONCLUSION 3

APPENDIX

Appendix A
Order of the United States Court of Appeals for the Sixth Circuit, dated May 4, 2005 . . . . . 1a

Appendix B
Memorandum, Opinion and Order of the United States District Court, Eastern District of Tennessee, dated February 22, 2001 . . . . . 3a

Appendix C
Motion under 28 U.S.C. §2244 for Order authorizing District Court to consider second or successive application for relief under 28 U.S.C. §2254 or §2255 . . . . . 16a

Appendix D
Addendum under 28 U.S.C. §2244 for Order authorizing District Court to consider second or successive application for relief under 28 U.S.C. §2254 or §2255 . . . . . 47a

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 US 466 (2000) . . . . . i, 2

Blakely v. Washington,
542 US ___, 124 S. Ct. 2531 (2004) . . . . . i, 1, 2

Mickens-Thomas v. Vaughn,
321 F. 3d 374, 384-85 (3d Cir 2003) 3

Teague v. Lane,
489 US 288 (1989) 2, 3

United States v. Booker,
543 US ___, 125 S. Ct. 738 (2005) . . . . . i, 1, 2

United States v. Chea,
231 F. 3d 531, 536-37 (9th Cir, 2000) 3

United States v. Siegelbaum,
CV-04-1380 (D. Or. Jan. 2005) 2

Rules

28 U. S.C. § 2241 1
28 U.S.C. § 2254 1
28 U.S.C. § 2255 1
28 U.S.C.§ 2241 1

PETITION FOR A WRIT OF CERTIORARI

Petition Hal Edward Hodges respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion for the Court of Appeals (is attached as Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 2005. This Court's jurisdiction is invoked under 28 U.S.C.§ 2241 & 28 U.S.C. §2254.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U. S.C. § 2241 etc. governs the filing of petitions to vacate judgments in the District Courts. A second or subsequent petition can be filed with permission of the Court of Appeals if the Supreme Court has promulgated a new rule and had granted retroactive application of that rule. It is the retroactive application for which the Petitioner is asking in this case.

STATEMENT

The Court below denied the Petition for Permission to File a Subsequent Application to Vacate Judgment pursuant to 28 U.S.C. § 2255 because it held that Blakely v. Washington and United States v. Booker are not to be applied retroactively. This issue is obviously of national importance because of the

important constitutional rights to jury trial and due process which are involved in the decisions of Blakely and Booker.

The Petitioner raised the Apprendi v. New Jersey claim in his initial Motion to Vacate Judgment Pursuant to 28 U.S.C. § 2255. The claim, therefore, is not a new claim as such in the motion to file a subsequent petition.

REASON FOR GRANTING PETITION

The ruling below does not address the Teague v. Lane, 489 US 288 (1989) exception to retroactivity nor does it address the compelling constitutional reasons for retroactive application.

The principles underlining Blakely and Booker meet the second Teague exception. When the guidelines were mandatory, Judges made decision as to the statutory maximum by preponderance of the evidence. We now know from Blakely and Booker that such decisions should have been made beyond a reasonable doubt. The rule in Booker, therefore, was necessary to guarantee fundamental fairness in the sentencing phase of a criminal case and improves the accuracy of the criminal process. United States v. Siegelbaum, CV-04-1380 (D. Or. Jan. 2005).

It is also interesting to note, therefore, that Teague was decided to minimize Federal interference in State Court convictions. That reasoning, consequently , does not apply to the case at bar.

In addition, if Booker does not present a new rule, (as held by Justice Stevens in him majority opinion) then Teague does not apply. Since the Petitioner raised his Apprendi claims in his initial Petition to Vacate his Judgment Pursuant

to 28 U.S.C. § 2255, Teague does not apply and the Court should Order retroactive application of Booker. The holding of the Court of Appeals for the Sixth Circuit below, therefore, suspect in that Booker does not arguably present a new rule.

In addition, this Court may find the ruling in Booker is not a procedural but a substantive decision. If so, it should have retroactive application. It is substantive because the decision effect the actual sentence that can be imposed. The transformation of the guidelines from an advisory system to a mandatory one clearly implicates a substantive rule and would mandate retroactive application pursuant to the Ex Post Facto Clause. United States v. Chea, 231 F. 3d 531, 536-37 (9th Cir, 2000) and Mickens-Thomas v. Vaughn, 321 F. 3d 374, 384-85 (3d Cir 2003)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DOUGLAS A. TRANT
Counsel of Record
900 S. Gay Street
Suite 1502 Riverview Tower
Knoxville, TN 37902
(865) 525-9780

July, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-6127

[Filed May 4, 2005]

In re HAL EDWARDS HODGES,)
Movant.)
)

ORDER

Before: GUY, DAUGHTREY, and GIBBONS, Circuit Judges.

Hal Edward Hodges, a federal prisoner proceeding through counsel, moves the court, pursuant to 28 U.S.C. § 2244, for an order authorizing the district court to consider a second or successive motion to vacate, set aside or correct sentence to be filed under 28 U.S.C. § 2255.

Hodges's motion does not satisfy the requirements of§ 2255. Hodges's motion does not rely upon either newly discovered evidence or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. In addition, Hodges's reliance upon *Blakely v. Washington,* 124 S. Ct. 2531 (2004), which is now controlled by *United States v. Booker,* 125 S. Ct. 738 (2005), is

misplaced. *Booker has* not been made retroactively applicable to cases on collateral review for purposes of a second or successive § 2255 motion. *See Booker,* 125 S. Ct. at 769; Bey *v. United States,* _ F.3d_, 2005 WL 469667, at *2 (10th Cir. Mar. 1, 2005); *Green v. United States,* 397 F.3d 101, 103 (2d Cir. 2005); *In re Anderson,* 396 F.3d 1336, 1339-40 (1 lth Cir. 2005).

For these reasons, we deny Hodges's motion for permission to file a second or successive § 2255 motion to vacate sentence.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:97-CV-738 (CR. 3-94-51)

[Filed February 22, 2001]

HAL EDWARD HODGES, Petitoner,	)
v.	)
UNITED STATES OF AMERICA, Respondent.	)

ORDER

In accordance with the accompanying memorandum opinion, this motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255, is DENIED. For masons stated in the opinion, the Court CERTIFIES that the petitioner has failed to make a substantial showing of the denial of a constitutional right and DENIES issuance of a certificate of appealability. Fed. R. App. P. 22(b). The Clerk is DIRECTED to close this file.